Supreme Court, U.S.
FILED
06-524 AUG 19 2006
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Alberta A. Swan - Petitioner

v.

Wal-Mart - Respondent

On Petition For Writ Of Certiorari To The Supreme Court of Pennsylvania

---

PETITION FOR WRIT OF CERTIORARI

Alberta A. Swan (Pro Se)
177 Eastbrook Road
Smoketown, PA 17576
717-239-0425

QUESTIONS PRESENTED

1. Did the Supreme Court of Pennsylvania address the Claimant's mental injuries before rendering a decision?

2. Did the Claimant provide medical documentation to prove that she became disabled as a result of the incident that occurred on September 18, 2001 (Americans with Disabilities Act 1990)?

3. Was the Claimant working under normal (standard) working conditions during the time of the incident that occurred on September 18, 2001?

LIST OF PARTIES

Office of the Prothonotary
Supreme Court of Pennsylvania
P.O. Box 624
Harrisburg, PA 17108

Thomas W. Corbett, Jr.
Attorney General of the Commonwealth of Pennsylvania
16th Floor Strawberry Square
Harrisburg, PA 17120

Commonwealth of Pennsylvania
Department of Labor and Industry
Workers' Compensation Appeal Board
901 N. 7th Street, 3rd floor
South Harrisburg, PA 17102-1412

Wal-Mart, # 2334
2304 Lincoln Highway East
Lancaster, PA 17601

Richard J. McCracken, Esq.
1857 WM PENN WY, STE 101
Lancaster, PA 17605

A.I.G. Claim Services, Inc.
P.O. Box 499
Essington, PA 19029

The Honorable Judge Robert Benischeck
Workers' Compensation Judge
315 West James Street, Suite 206
Lancaster, PA 17603

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Appendix B Order of the Supreme Court of Pennsylvania May 1, 2006

Appendix C Opinion of the Workers' Compensation Appeal Board January 26, 2005

Appendix D Decision of the Workers' Compensation Judge January 23, 2004

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appear at Appendix A (Order of the Supreme Court of Pennsylvania, June 6, 2006) and Appendix B (Order of the Supreme Court of Pennsylvania, May 1, 2006) to the petition and is unpublished.

The Opinion of the Workers' Compensation Appeal Board (January 26, 2005) appears at Appendix C to the petition and is unpublished.

The Decision of the Workers' Compensation Judge (January 23, 2004) appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was June 6, 2006. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I was a Wal-Mart employee who worked in the Cash Room of Wal-Mart store # 2334 located in Lancaster, Pennsylvania. I was hired to protect Wal-Mart's assets. On September 18, 2001, I was assaulted by a Wal-Mart employee who relentlessly tried to force his way into the Cash Room - no employees are allowed into the Cash Room unless accompanied by management. As a result of being assaulted by the Wal-Mart employee, I am now totally disabled.

I provided medical documentation by licensed physicians to prove my disability (Americans with Disabilities Act of 1990). However, I was denied Workers' Compensation rights by Wal-Mart and also by the Workers' Compensation Appeal Board. The Supreme Court of Pennsylvania denied my Application for Reconsideration of this matter. Therefore, I respectfully pray that a writ of certiorari be granted for this petition.

REASONS FOR GRANTING THE PETITION

September 18, 2001, I was in the course and scope of my employment at Wal-Mart in Lancaster, PA (store # 2334). My job title was an Accounting Clerk. My job responsibilities were to take the cash bags from the Accounting Room into the Cash Room. I then would separate the bottle caps, credit card receipts, coupons, telephone card receipts and other paper receipts from the cash. Next, I would then count the cash and place a new amount of cash in the bags for the cashiers' registers for the next day. I would then enter the amount of receipts for the evening in the computer and prepare the bank deposit slips. I was normally alone while performing my job duties.

On September 18, 2001 between the hours of 2:00 am and 3:00 am, I was alone in the Cash Room in the course and scope of my employment at Wal-Mart when I heard a loud knock on the Accounting Room door. The Accounting Room door was a steel door that had two locks, one was a deadbolt and the other was a door lock. The deadbolt lock was very loose. In fact, I had informed my Assistant Manager (Kevin) and my acting Supervisor (Wendy) that this lock was loose. I had informed them about the loose lock at least five or more times prior to the incident. They would tell me that the lock was OK and did not seem concerned about changing the lock. I would complain to my Management, because I felt very unsafe working alone with large amounts of cash in a room that was not completely secured.

When I heard the loud knock on the Accounting Room door, I went to the intercom inside the Accounting Room and asked the person if I could help them. There was a man at the door demanding that I open the door. I told him that he was not allowed or authorized to come inside this room; only Management and employees accompanied by Management were allowed into the Accounting Room – there were no exceptions to this rule. However, he kept demanding that I open the door. I then looked up into the

video monitor and I saw a man with a baseball cap. He then went to the door and started slamming his body up against the door, demanding that I let him in. This man was not an employee who should have been allowed inside the cash room.

I then got on the store intercom and called for my Assistant Manager, Kevin, to come to the Cash Room. When Kevin did not respond, I got on the intercom and called for him again. Since he did not respond the first or second time I called for him, I then got on the intercom and called my husband, Roy, to come to the Cash Room. My husband was working in Produce at the time of the incident. He called me immediately on the telephone and asked if I was OK. I told him that someone was trying to break into the Cash Room. We hung up and I called 911. The 911 Operator asked me what was going on and I told her where I worked, my name and that someone was trying to break into the Cash Room. She then put a gentleman on the phone to speak with me, and while I was talking to him, I went back into the Cash Room and locked the door. Within seconds, my husband came to the Customer Service area, near the Accounting Room door. The man left from the door and confronted my husband. I heard him tell my husband to get away and to go back to work. My husband then asked him if he knew if I was all right and was he the one bothering me. Within a few seconds after the commotion started, I then heard a key being put inside the lock of the Accounting Room door and my Assistant Manager asking me if I was all right. I told him that I was all right, meaning that I was glad he was there and that the incident was over. My Assistant Manager asked me several times if I was OK and he allowed my husband to come in to the Accounting Room. I then asked my Assistant Manager where he was when I called him and that he should have fixed the lock on the door months ago when I had informed him and my acting Supervisor that the lock was loose. He responded by saying that I never should have called the police.

I then spoke to the police woman to finish filling out the police report and I then went back to work, even though I was quite upset and frightened by the whole incident. My acting Supervisor (Wendy) came in later that morning. I told her what happened and then I went home.

I went home and I could not go to sleep. I felt nervous, scared, nauseous, tense, tightness in my chest and had a severe headache. I took my blood pressure and it was 200/115. Before the incident, my blood pressure was 140/80. Due to being so upset from the incident and seeing my blood pressure readings, I immediately called my doctor, Dr. Farrell Crouse, and he told me to come to him right away. When I went to his office, I told him about what happened that morning and he told me that I was suffering from extreme anxiety, which was causing my blood pressure to be extremely high. He told me I was suffering from post-traumatic panic attacks as a result of the incident. He put me on Wellbutrin for my anxiety and recommended that I should not go to work. He wrote me a disability note excusing me from work. I then went home, took my anxiety medicine and went to sleep.

Over the next few weeks, I was so depressed and nervous from the incident that I would only get out of bed to go to the bathroom and then I would go back to bed. I was taking double the dosage of my anxiety medicine. Due to my blood pressure still being extremely high after the incident, my anxiety increased even more, because all I could think about was that I was going to have a stroke. This increased anxiety caused me to start having anxiety attacks 3 to 4 times a day, whenever I would be awake. I then went to see my doctor, Dr. Allen Auerbach, for my blood pressure. After checking my blood pressure, he also tested my blood sugar. My blood sugar was over 300. Before the incident, my blood sugar was approximately 106. The last time I had to take a prescribed medicine to control my blood sugar was in the 1980's. However, after the incident, Dr. Allen

Auerbach had to put me back on prescribed medicine to try to lower my blood sugar. At this point in time, my blood sugar is still not controlled. As I stated earlier in this petition, Dr. Farrell Crouse had to put me on Wellbutrin for post-traumatic panic attacks. Even with the Wellbutrin, the post-traumatic panic attacks still continue. As a result of the incident, my health has drastically deteriorated.

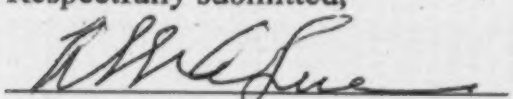
I applied for Workers' Compensation, but my request was unlawfully denied. According to Workers' Compensation laws, workers who are injured in the course of their employment are entitled to Workers' Compensation. There are four types of injuries which Workers' Compensation may cover: traumatic physical injuries, repeated trauma injury, mental injuries, and occupational disease. According to Workers' Compensation laws, the aggravation of a pre-existing condition, such as a physical or emotional condition which was not caused by work, is a covered injury under the Workers' Compensation Act; that is, if performing one's job aggravates a pre-existing medical condition, the aggravation of that condition by performing work duties constitutes a covered injury. The Americans with Disabilities Act prohibits discrimination against individuals with disabilities, defined as a physical or mental impairment that substantially limits one or more major life activities. By law, individuals suffering from these disorders which includes post traumatic anxiety attacks, are protected from discrimination in employment, with the EEOC required to protect these individuals (if the EEOC rules against a company, penalties and subsequent judgments may be awarded in court). However, I was denied my rights to Workers' Compensation even though I provided documentation to prove that I am disabled as a result of the September 18, 2001 incident. By law, when the injured is unable to work because of an injury or illness which was caused by his employment, he or she is entitled to disability compensation payments. Payments for permanent disability

are over and above the cost of medical care. Not only have I been unlawfully denied my rights to Workers' Compensation, but I have also not been reimbursed for medical expenses. Before the September 18, 2001 incident, I did not depend on walking canes, a walker, or a motorized wheelchair to get around. Before September 18, 2001, I was not having post-traumatic attacks. As a result of the incident on September 18, 2001, I have to depend on walking canes, a walker, and a motorized wheelchair to get around. As a result of the incident on September 18, 2001, I have post-traumatic attacks. As a result of the incident on September 18, 2001, I am totally disabled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Alberta A. Swan

Date: 8/16/06

(2) 06-524 Aug. 19, 2006

APPENDICES

Appendix A Order of the Supreme Court of Pennsylvania
June 6, 2006

Appendix B Order of the Supreme Court of Pennsylvania
May 1, 2006

Appendix C Opinion of the Workers' Compensation
Appeal Board January 26, 2005

Appendix D Decision of the Workers' Compensation Judge
January 23, 2004

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ALBERTA A. SWAN,	: No. 718 MAL 2005
	:
Petitioner	: Application for
	: Reconsideration
v.	:

WORKERS' COMPENSATION APPEAL BOARD (WAL-MART # 2334 AND A.I.G. CLAIM SERVICES, INC.),

Respondents

ORDER

PER CURIAM

AND NOW, this 6th day of June, 2006, the Application for Reconsideration is hereby DENIED.

"s/Norina K. Blynn"
Chief Clerk
Seal of the Supreme Court of Pennsylvania
True & Correct Copy
Attest: June 06, 2006

Appendix A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ALBERTA A. SWAN,	: No. 718 MAL 2005
	:
Petitioner	: Petition for Allowance
	: of Appeal from the
	: Order of the
v.	: the Commonwealth
	:Court

WORKERS' COMPENSATION APPEAL BOARD (WAL-MART # 2334 AND A.I.G. CLAIM SERVICES, INC.),

Respondents

ORDER

PER CURIAM

AND NOW, this 1st day of May, 2006, the Petition for Allowance of Appeal is hereby DENIED.

"s/Norina K. Blynn"
Chief Clerk
Seal of the Supreme Court of Pennsylvania
True & Correct Copy
Attest: May 01, 2006

Appendix B

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
WORKERS' COMPENSATION APPEAL BOARD
901 N. 7TH STREET; 3RD FLOOR SOUTH
HARRISBURG, PA 17102-1412

Opinion Mailing Date: 01/26/05
A04-0448

ALBERTA A. SWAN, Claimant
177 EASTBROOK ROAD
SMOKETOWN, PA 17576

WAL-MART # 2334, Defendant
2304 LINCOLN HIGHWAY EAST
LANCASTER, PA 17601

A.I.G. CLAIM SERVICES, INC.
P.O. BOX 499
ESSINGTON, PA 19029

RICHARD J. MCCRACKEN, ESQ.
1857 WM PENN WY, STE 101
P.O. BOX 10248
LANCASTER, PA 17605

Attached is a copy of an Opinion from the Workers' Compensation Appeal Board filed this date in the above-captioned case. An appeal to the Commonwealth Court of Pennsylvania may be taken by any party aggrieved by the Board's decision, provided such appeal is taken within (30) days after the mailing date of the Board's decision. The Board has nothing to do with the filing or processing of further appeals to the Court. Further appeals may be filed in person or by mail (accompanied by U.S. Postal Services Form 3817) with the Prothonotary of the Commonwealth Court of Pennsylvania, Room 624 Irvis Office Building, Harrisburg, Pennsylvania, 17120. - Attachment

Appendix C

COMMONWEALTH OF PENNSYLVANIA
WORKERS' COMPENSATION APPEAL BOARD
HARRISBURG

A04-0448

ALBERTA A. SWAN, Claimant : APPEAL BY
177 EASTBROOK ROAD : CLAIMANT FROM
SMOKETOWN, PA 17576 : ORDER OF WC
: JUDGE
: BENISCHECK

vs.

WAL-MART # 2334, Defendant :
2304 LINCOLN HIGHWAY EAST:
LANCASTER, PA 17601 : HARRISBURG /
: APRIL, 2004

AFFIRMED

A.I.G. CLAIM SERVICES, INC. : INSURANCE
P.O. BOX 499 : CARRIER
ESSINGTON, PA 19029

: CLAIMANT'S
: COUNSEL

RICHARD J. MCCRACKEN, ESQ. : DEFENDANT'S
1857 WM PENN WY, STE 101 : COUNSEL
P.O. BOX 10248
LANCASTER, PA 17605

Opinion

Davis, Commissioner:

This matter is presently before the Workers' Compensation Appeal Board on Claimant's Appeal from the Decision of Workers' Compensation Judge Robert Benischeck (Judge), denying Claimant's Claim Petitions. We affirm the Decision of the Judge.

Our review of the record indicates that Claimant, Alberta Swan, filed Claim Petitions on or about November 6, 2001 and March 3, 2003 for alleged injuries sustained while in the employ of Defendant, Wal-Mart Store 2334. Claimant alleged that on September 18, 2001, she sustained work-related psychological and physical injuries. Defendant filed timely Answers denying the allegations.

The Judge denied Claimant's Claim Petition. The Judge found that Claimant was not exposed to abnormal working conditions. Claimant did not establish that she sustained any physical injury. He also found that Claimant did not establish that she was disabled. Claimant appeals this Decision.

The Board's scope of review on appeal is limited to determining whether the Judge has committed an error of law or whether the findings of fact are supported by substantial, competent evidence. *Pertile v. Workmen's Compensation Appeal Board* (*Construction Engineering Consults, Inc.*), 546 Pa. 569, 687 A.2d 367 (1997); *Bethenergy Mines Inc. v. Workmen's Compensation Appeal Board* (*Skirpan*), 531 Pa. 287, 612 A.2d 434 (1992).

Claimant argues on appeal that the Judge erred in denying her Claim Petitions. In a claim petition, the claimant bears the burden of establishing all the necessary elements. *Inglis House v. Workmen's Compensation Appeal Board* (*Reedy*), 535 Pa. 135, 634, A.2d 592 (1993). When there is no obvious causal connection between the injury and the

work-related cause, unequivocal medical testimony is necessary to establish that connection. *Lynch v. Workmen's Compensation Appeal Board* (*Teledyne Vasco*), 545 Pa. 119, 680 A.2d 847 (1996); *Cromie v. Workmen's Compensation Appeal Board* (*Anchor Hocking*), 600 A.2d 677 (Pa. Cmwlth. 1991). The claimant has the burden of proving, by objective evidence, that he or she has suffered a mental injury and that such injury is other than a subjective reaction to normal working conditions. *Davis v. Workers' Compensation Appeal Board* (*Swarthmore Borough*), 561 Pa. 462, 751 A.2d 168 (2000); Martin *v. Ketchum, Inc.*, 523 Pa. 509, 568 A.2d 159 (1990); Carnegie *Mellon University v. Workmen's Compensation Appeal Board* (*Lenz*), 645 A. 2d 389 (1994); *appeal denied*, 542 Pa. 675, 668, A.2d 1137 (1995). To meet that burden, the claimant must demonstrate either (1) that actual extraordinary events occurred at work, which can be pinpointed in time, causing the trauma experienced by him or her, or (2), that abnormal working conditions over a longer period of time caused the mental injury. *Parson v. Workmen's Compensation Appeal Board* (*Springettsbury Township*), 642 A.2d 579 (1994). Psychiatric injury cases are highly fact-sensitive. *Hershey Chocolate Co. v. Commonwealth,* 546 Pa. 27, 682 A.2d 1257 (1996). Consequently, in determining whether actual working conditions are abnormal, they must be considered in the context of the specific employment. *Id.* The question of whether the facts found by the WCJ support the conclusion that the claimant has been exposed to abnormal working conditions is a question of law fully reviewable on appeal. *Id.*

Claimant testified that she was employed by Defendant as an accounting clerk. She worked in the cash room preparing the receipts for deposit, accounting and distributing paychecks. Entrance to the cash room can only be gained from the accounting room. (N.T., 3/14/02, pp. 6-

9). Claimant testified that she was alone in the office at 2:00 am. Someone began hollering at the accounting room door, demanding entry and knocking forcefully. She recognized the voice. Claimant testified that she had seen the man previously "doing something to the cameras up at the top of the building." He had also previously been in the cash room with a manager. The man was denied entry; he began try to break the door down with his body. She paged her manager, who did not respond, and her husband who worked in the produce department. She also dialed 9-1-1. *Id.* At 14-22. After the incident, Claimant had difficulty sleeping. Her blood pressure was high. Claimant testified that she has not returned to work because of her mental condition. *Id.* At 22-25.

Claimant subsequently became aware that the man seeking entrance to the accounting room was Michael Schmidt. She testified that she was not aware that he was an employee, but she reimbursed $27.54 to Mr. Schmidt as a travel expense. She also saw Mr. Schmidt in the cash room, accompanied by a manager. (N.T., 3/26/03, pp. 32-39).

Defendant presented the testimony of Michael Schmidt. Mr. Schmidt was employed by Defendant as a loss prevention officer. Mr. Schmidt met Claimant "a couple of times" prior to the incident. He met Claimant while getting travel and meal voucher money. Mr. Schmidt explained that he was required to fill out a form, present it to a manager, and then the manager and he would go to the cash office to receive the money. Mr. Schmidt and other loss prevention officers were introduced to Claimant on the night of the incident, prior to the incident. (N.T., 8/12/03, pp. 19-23). Later, Mr. Schmidt went to the cash room in order to check the monitor and camera system. He knocked on the accounting room door, identified himself, and looked at the camera so that the occupants of the accounting room could identify him. He knocked "a couple of times" in what he

characterized a "regular knock." Mr. Schmidt was told to leave because "she didn't know who I was." He identified himself again and was told the police would be called if he did not leave. *Id.* At 24-29.

Defendant also presented the testimony of Brian Smith. Mr. Smith was Defendant's district loss prevention supervisor. At the time of the incident, he was installing and upgrading
surveillance equipment. Earlier in the evening, he was in the cash room with Claimant and Mr. Schmidt, discussing camera placement. Mr. Smith directed Mr. Schmidt to go the accounting room to check supplies and report on the camera placement. He was not present when Mr. Schmidt tried to gain access to the accounting room (N.T., 5/13/03, pp. 79-90).

Claimant presented the testimony of Farrell Crouse, M.D. Dr. Crouse examined Claimant after the September 18, 2001 incident and found her "very anxious" and depressed secondary to the anxiety. Claimant's condition has improved measurably over the course of treatment. (Dep. Dr. Farrell Crouse, 6/23/03, pp. 10-13). Dr. Crouse had treated Claimant prior to the work incident for "an adjustment reaction due to family problems." (Dep. Dr. Crouse, p. 23).

Defendant presented the testimony of Abram Hostetter, M.D. Dr. Hostetter examined Claimant on March 13, 2002, at which time he obtained a history. (Dep. Dr. Abram Hostetter, 8/5/03, p. 12). He found Claimant to have an Axis 2 histrionic personality disorder. He explained that she has a pattern of functioning which is characterized by excessive emotionality; reacting in an excessive way to situations that may not cause other people to have any trouble. (Dep. Dr. Hostetter, pp. 34-35). He did not believe that Claimant has a psychological disorder related to the work incident. She was able to return to work. (Dep. Dr. Hostetter, pp. 39-41). Dr. Hostetter opined that Claimant

"overreacted to a situation that she could have come to understand and handled in a very different way", but "she, because of her personality makeup, overreacted to that situation and turned it into a kind of claim that some, that things were going on that in no way were really going on." (Dep. Dr. Hostetter, p. 46).

The Judge found the testimony of Mr. Schmidt, Mr. Smith, and Dr. Hostetter credible. The Judge has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight. *Sherrod v. Workmen's Compensation Appeal Board* (*Thoroughgood, Inc.*), 666 A.2d 383 (Pa. Cmwlth. 1995). The Judge can accept or reject the testimony of any witness, in whole or in part. *Lombardo v. Workers' Compensation Appeal Board* (*Topps Company, Inc.*), 698 A.2d 1378 (Pa. Cmwlth. 1997). The Board will not disturb the Judge's findings if they are supported by substantial, competent evidence. *Greenwich Collieries v. Workmen's Compensation Appeal Board* (*Buck*), 664 A.2d 703 (Pa. Cmwlth. 1995).

The Court in *Container Corporation of America v. Workmen's Compensation Appeal Board*, 429 A.2d 1264 (Pa. Cmwlth. 1981) explained why a judge can best determine issues of credibility. In *Container Corporation*, the Court stated:

> In a workmen's compensation case, the referee has a critical fact finding role; he alone hears the testimony and observes the witnesses first hand. In proceedings pertaining to benefits, therefore, it is for the referee to determine the credibility and weight of the evidence. In exercising that broad discretion, he may accept or reject the testimony of any witness in whole or in part. This includes the testimony of expert medical witnesses. It is also within the referee's domain

> to resolve any conflicts or equivocations in testimony and determine its relative merit. 429 A.2d at 1267.[1]

We have determined that the Judge's Decision denying Claimant's Claim Petition is supported by substantial competent evidence. Claimant presented no testimony establishing that she sustained any physical injuries. We agree that Claimant's working conditions were not abnormal. Even if the Judge were to accept Claimant's version of the facts, the incident did not arise to the level of abnormal working conditions. In *Philadelphia Newspapers, Inc. v. Workmen's Compensation Appeal Board (Guaracino)*, 544 Pa. 203, 675 A.2d 1213 (1996), the Pennsylvania Supreme Court found that harassment and abuse did not constitute abnormal working conditions. The Court did not find abnormal working conditions where the claimant feared bodily harm from potentially criminal conduct. *City of Pittsburgh v. Workers' Compensation Appeal Board (Plowden)*, 804 A.2d 82 (Pa. Cmwlth. 2002). In this case, the Judge did not accept Claimant's testimony, but instead found Mr. Schmidt credible. Based on Mr. Schmidt's testimony and Dr. Hostetter's opinions, the Judge found, and the evidence supports, that Claimant's reaction to the events was atypical.

[1] See also *Aluminum Company of America v. Workmen's Compensation Appeal Board*, 380 A.2d 941 (Pa. Cmwlth. 1977) (the determination of a witness's credibility lies within the province of the judge because he had heard the witness's testimony and observed his demeanor).

In summary, Claimant could not prevail because she did not present any credible medical testimony evidencing a physical injury and the Judge did not believe her version of the events. No error of law was committed. Accordingly, we enter the following:

Order

The Decision and Order of the Judge denying Claimant's Claim Petitions is hereby Affirmed.

By the Board:
"s/William R. Davis"
Commissioner
January 26, 2005

Concurred in By:

"s/Gail L. O'Neal"
Commissioner

"s/_____"
Commissioner

"s/ Susan M. McDermott"
Commissioner

"s/Joseph T. Rafferty"
Commissioner

"s/Joseph P. Santone
Commissioner

"s/Robert T. McIntyre"
Commissioner

"s/_____"
Commissioner

Circulation Date: 01/27/2004

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
717-299-7591

ALBERTA A SWAN
177 EASTBROOK RD
SMOKETOWN, PA 17576-0000

DECISION RENDERED COVER LETTER

Bureau Claim Number: **2340253**
Insurer Claim Number:

Petitions
Claim-Pet
Claim-Pet

JUDGE: Robert Benischeck
315 West James Street, Suite 206
Lancaster, PA 17603

ALBERTA A SWAN
177 EASTBROOK RD
SMOKETOWN, PA 17576-0000

Vs

WALMART # 2334
2304 LINCOLN HWY EAST
LANCASTER, PA 17601

RICHARD J. McCRACKEN ESQUIRE
POST & SCHELL PC
PO BOX 10248
LANCASTER, PA 17605-0248

The attached Decision of the Judge is final unless an appeal is taken to the Workers' Compensation Appeal Board as provided by law.

Appendix D

AMERICAN INTERNATIONAL ADJ CO
PO BOX 499
ESSINGTON, PA 19029-0499

If you do not agree with this Decision, an appeal must be filed with the Workers' Compensation Appeal Board within 20 days from but not including the date of this notice.

Forms for an appeal may be obtained from the Workers' Compensation Appeal Board, Capital Associates Building 901 North Seventh Street Third Floor South Harrisburg, PA 17102

Employee Witnesses & Exhibits:

Ray Swan
Brian Smith
Michael Axe
Alberta Swan
Alberta Swan
Alberta Swan
Alberta Swan
Sharon Tomeka Swan

C-01 Memo of Roy Swan
C-02 Claimant statement, 7/30/02
C-03 Subpoena of Dr. Auerbach
C-04 Claimant Statement, 10/24/01
C-07 Deposition of Dr. Crouse
C-08 Oath of Hippocrates
C-09 MRI Report 2/21/03
C-10 Confidential surveillance report 7/17/02

Employer Witnesses & Exhibits

Michael Schmidt

D-01 Cash Fund Transfer Logs
D-02 Depo of Dr. Abram Hostetter 8/5/03

Hearings

8/12/2003	13:30:00	Held
5/13/2003	09:00:00	Held
3/26/2003	09:45:00	Held
3/5/2003	09:00:00	Held
1/15/2003	11:45:00	Held
12/2/2002	09:30:00	Held
7/31/2002	13:00:00	Held
5/3/2002	09:00:00	Held
3/14/2002	13:00:00	Held
2/14/2002		Canceled by Employee Counsel On 02/11/02
1/24/2002		Canceled by Employee Counsel On 01/14/02

FINDINGS OF FACT

1. The Claimant filed a Claim Petition in November of 2001 alleging an injury of September 18, 2001 while in the course and scope of her employment with the Employer, Wal-Mart. The Petition seeks total disability as of September 18, 2001. This Petition was originally assigned to Judge Richard Kelley and reassigned to this Judge on August 2, 2002 due to the former's terminal illness.
2. An Amended Claim Petition was filed in March, 2003, again alleging an injury of September 18, 2001 and seeking total disability as of that date. At the hearing of March 5, 2003 Claimant explained that the Amended Petition was filed to insure that her Claim included both a physical and psychiatric injury.
3. In support of her Petition, the Claimant presented her own testimony on at least three dates, March 14, 2002, March 5, 2003 and March 26, 2003. Claimant also presented the testimony of her husband Roy Swan, her daughter Sharon Tomeka Swan, and the deposition of Dr. Farrell Crouse. The Claimant also submitted statement from her and her husband dated October 24, 2001, a copy of the Hippocratic Oath and an MRI report of the low back dated February 21, 2002 and the police report.
4. In opposition to the Petition, the Employer submitted the deposition testimony of Dr. Abram Hostetter and presented the live testimony of Dennis Colbert, Brian Smith, Michael Axe and Michael Schmidt, and also

submitted the Cash Fund Transfer Log from September 2001.

5. Claimant first began working at Wal-Mart in September of 2000 as an accounting clerk. Claimant's shift was from 10:00 P.M. to 7:00 A.M. and she earned $8.84 per hour for an average weekly wage of $373.60. Claimant worked in the cash room.
6. In the cash room Claimant would take the bags from the cashier and prepare the bags for the bank. This would mean straightening out the money, entering the amounts into the computer and getting the money ready for deposit.
7. The cash room is attached to the accounting room. One has to go through the accounting room to get into the cash room and this is the only entrance into the cash room.
8. The accounting room door had a lock, which Claimant described as loose. There was a TV monitor outside the accounting room door which allowed someone in the accounting room to see who was outside the door. The cash room door also had a lock and Claimant described this door as very heavy and very secure.
9. The only individuals who had access to the accounting room outside of the workers assigned to that location was the management of Wal-Mart.
10. Claimant was working in the cash room on September 18, 2001, between 2:00 A.M. and 3:00 A.M. Claimant was alone in the office when she heard a man hollering at the accounting room door to open the door and let him in. Claimant testified that the man was knocking a very heavy knock. The knocking and hollering was described by Claimant as "steady". According to Claimant, she next heard a body push against the door. Claimant paged Kevin the Manager. When he did not respond, Claimant called her husband who worked in the Produce Department of Wal-Mart, and then called 911. Ultimately, the

police, the Manager, and the husband arrived before the man at the door gained entrance.

11. Claimant testified that during this incident she could she the man through the TV monitor and she recognized him as the man she had earlier seen doing something to the cameras near the ceiling of the store. She saw this man in the store many times but less than a dozen. She also recognized his voice. Claimant recognized the man as being in the cash room previously with management, and Claimant gave the man money for mileage and food reimbursement at the direction of management. She did not know whether he was an employee. Claimant did not testify that this man seeking entry used profanity, verbally threatened her, or was seen carrying a weapon.
12. Claimant was presented with a Cash Log which recorded transfers from the cash fund. Anytime she took money out of cash, she and the recipient would sign the sheet and it would be approved by management. Claimant admitted that the sheet on September 5, 2001 indicated that she had given money in the amount of $27.54 to Michael Schmidt, who proved to be the man at the door.
13. Under cross-examination, Claimant testified that she did not know at the time of the incident that Wal-Mart was installing surveillance cameras throughout the store, and she denied that management ever told her that the man at the door was part of the work crew installing cameras.
14. Claimant finished working her shift. She testified that when she went home and tried to sleep, she realized that her blood pressure was elevated. She began treating with Dr. Crouse. Dr. Crouse has been Claimant's treating physician for thirty years. Claimant testified that her prior psychiatric treatment was for family matters. She was taking Librium and anti-anxiety medicine for at least two years before this

incident. Dr. Crouse has treated her since she was approximately 24 years old for high blood pressure. After this incident, Dr. Crouse treated Claimant through counseling and medication, specifically Wellbutin.

15. Claimant testified at the hearing of March 14, 2002 that she had not gone back to work at Wal-Mart since the incident of September 18, 2001 because of her mental condition. In her initial testimony, she did not state that she was disabled due to physical reasons.
16. At the time of the March 5, 2003 hearing the Claimant testified that this incident also resulted in physical injuries including a worsening of her blood pressure, a worsening of her diabetes, memory loss, a worsening of her back condition, numbness in both hands, headaches, constipation, pain in her low back, thighs and calves. However, no medical testimony was presented to establish that these physical injuries or any such problems were work related or disabling.
17. Claimant returned to Wal-Mart parking lot a number of times as part of her psychological therapy but could not get into the building because of anxieties, according to Claimant.
18. Claimant admitted that the incident that night was not a robbery and that the police did not find any criminal action.
19. Claimant had a herniated disc in her back for which she had surgery in 1991, according to her testimony.
20. The Judge reviewed Claimant's statement dated October 24, 2001 and notarized on July 31, 2002, and found that it is fairly consistent with her testimony concerning the incident of September 19, 2001.
21. In support of her Claim, the Claimant also presented the testimony of her daughter, Sharon Tomeka Swan. The daughter testified that she has seen a drastic change in her mother since the work incident. The

daughter described problems that Claimant experienced while dressing and walking.

22. Sharon Tomeka Swan further testified that the day after the incident she and her father went to the store to speak to the manager, Dennis Colbert. According to the daughter, Dennis Colbert testified that there was a videotape of the incident and that he would view it. Ms. Swan admitted that Mr. Colbert did not have the videotape in his hand at the meeting and that Mr. Colbert did not state that he had already viewed any video.
23. Roy Swan testified on May 3, 2002 that he received a call from his wife between 2:00 A.M. and 3:00 A.M. on September 18, 2001. He immediately went to the accounting room where he saw three men outside the door, approximately eight feet away. He testified that when he asked if anyone harassed his wife, the man started to walk toward Roy with a mean look on his face. Mr. Swan felt threatened. Just as he reached Mr. Swan the manager, Kevin, and the police arrived.
24. Mr. Swan did not see or hear any of the men at the door yell at the Claimant, bang on the door or threaten his wife. He confirmed that his wife was still in the accounting room behind the door by the time management and the police arrived.
25. Mr. Swan confirmed that Claimant had high blood pressure and low back problems before this accident. However, he testified that her health has worsened since the incident. Claimant cannot cook, do housework or even communicate with her husband as she did before the accident.
26. In September of 2001 Mr. Dennis Colbert was the manager of this Wal-Mart store in Lancaster. He was not present at the store at the time of the incident.
27. Mr. Colbert testified that in September 2001 Wal-Mart was installing a new camera security surveillance system in this store. The individuals who

were handling the cameras were Wal-Mart employees from Loss Prevention. The Loss Prevention supervisor was Brian Smith.

28. The surveillance system was periodically shut down, typically over night, in order to work on the cameras. Mr. Colbert explained that the system would be shut down overnight because that was when Wal-Mart was least busy and the least amount of occurrences would happen. This testimony is corroborated by Brian Smith.
29. Under normal circumstances, outside the accounting office would be videotaped and the videotape saved for thirty days. This is in addition to the closed circuit camera outside of the accounting office which allowed a worker inside the accounting office could see who was outside the door. The images from this camera were never recorded on videotape. This testimony is consistent with Mr. Smith's description of the security system.
30. Mr. Colbert agreed that he had a meeting with Mr. Swan and his daughter on September 19, that lasted from one to one and a half hours. During this meeting he was under the assumption that the cameras videotaped the incident outside the accounting door. He testified that he probably stated that he would view the videotape, if it was available.
31. However, when Mr. Colbert investigated the videotape after the meeting, he learned that no videotape existed because the system was not operational that night because of the work being performed on the surveillance system.
32. Mr. Colbert also explained the cash fund transfer (CFT) system. Mr. Colbert testified that any time cash is given out of the office, it is recorded on the cash fund transfer log on the store accounting sheet. The log is signed by the manager and also the employee who is given the money.

33. Based on the testimony of Mr. Colbert and this Judge's review of the log, this Judge finds that Mrs. Swan gave money to Mr. Schmidt on at least two occasions, September 5 and September 12, 2001. Even Claimant admitted, as noted above in Finding of Fact #12, that she gave money to Mr. Schmidt on September 5, 2001.
34. Mr. Brian Smith was employed by Wal-Mart in September 2001 as District Loss Prevention Supervisor. His area included the Lancaster store where this incident occurred.
35. Mr. Smith testified that in September of 2001, Wal-Mart was overhauling and performing an overall update of the security system at the Lancaster store. He and a crew which included Michael Schmidt and Michael Axe were performing the overhaul. He and his crew wore Wal-Mart badges to identify themselves as security personnel.
36. Consistent with testimony of Mr. Colbert, Mr. Smith testified that there was no videotape of this incident outside of the accounting door because the system was down for the overhaul.
37. Mr. Smith testified that he and Mr. Schmidt were in the accounting room/cash room during the shift of this incident prior to 2:00 A.M. and he testified that Mrs. Swan was present while they were discussing the placement of the cameras. He could not recall if there were any verbal interactions between Mrs. Swan and Mr. Schmidt.
38. Mr. Smith and his crew went to lunch between 1:00 A.M. to 2:00 A.M. in morning. Upon their return, the supervisor instructed Mr. Schmidt to go to the accounting office to finish looking at whatever supplies were needed to complete the work. Mr. Smith told Mike Schmidt to begin installing the cameras in the accounting room.

39. After Mr. Schmidt was gone for approximately five to ten minutes, Mr. Smith was called to the front of the store for a situation that needed his attention. When Mr. Smith came to the accounting room, Kevin the assistant manager was approaching and Michael Schmidt was standing off to the side. Michael Schmidt told Mr. Smith that he went to the accounting office and knocked on the door but was not allowed in the room. The police arrived. Mr. Smith described Mr. Swan as very upset and yelling about individuals harassing his wife.
40. Mr. Smith testified that there was no robbery that night and that at no point did he see anyone threaten Mrs. Swan, either physically or verbally. Mrs. Swan remained in the accounting room until the police arrived.
41. Mr. Michael Axe was employed in September of 2001 by Wal-Mart in Loss Prevention. Mr. Axe is a retired police sergeant and was an elected constable for twelve years.
42. According to Mr. Axe, after lunch on September 18, he and Michael Schmidt went to the cash office to check on cameras and perform work in the area. On his way to the accounting area, Mr. Axe stopped in the Men's room for approximately 1 to 2 minutes to wash his hands. When Mr. Axe arrived in the accounting area, Mr. Schmidt was standing outside the office and stated that the women had called 911 for a robbery in progress.
43. The significance to Mr. Axe's testimony is that the police were called within a few minutes of when Mr. Schmidt presumably would have arrived at the accounting room.
44. In September 2001 Michael Schmidt was working for Wal-Mart as a Loss Prevention Officer. On September 18, 2001, he was part of the crew overhauling security camera systems in the store.

This is somewhat corroborated by Claimant's testimony when she indicated that she saw him working near the cameras in the ceiling of Wal-Mart. Prior to his employment with Wal-Mart, he was a police officer for a period of two years, worked in closed circuit television stores at other areas, and served in the Marines. At the time of the testimony, he was employed as a police officer and was no longer an employee of Wal-Mart.

45. Mr. Schmidt testified that he met Alberta Swan while working as a Loss Prevention Officer in Wal-Mart prior to this incident. He was introduced to Mrs. Swan a couple of times by managers. He received travel voucher money from Mrs. Swan which is corroborated by the CFT logs described above.
46. According to Mr. Schmidt, in the evening of September 18, 2001 Mr. Schmidt and others from the Loss Prevention crew were in the cash office with an assistant manager, and were introduced to Mrs. Swan as Loss Prevention workers who would be in working the area of the cash office. On a second occasion that evening he was in the cash office to check the layout for the placement of cameras.
47. After lunch Mr. Schmidt was sent by his supervisor, Brian Smith, to the cash room with Michael Axe to work on the camera system. Michael Axe was side tracked at the restroom. When Mr. Schmidt arrive at the accounting door, he testified that he knocked on the door and announced himself as Mike from Loss Prevention and looked up into the closed circuit camera so that personnel in the accounting room would have an opportunity to recognize him.
48. Mr. Schmidt testified that he knocked on the door a couple of times and he described his knock as "regular". He further testified that he identified himself and requested admittance to the room and

denied threatening Mrs. Swan in any way when he was at the door.

49. According to Mr. Schmidt, Mrs. Swan indicated that she did not know who he was and warned that if he did not leave immediately she was going to call the police. Mr. Schmidt immediately went to use a phone to call his supervisor, Brian Smith, to advise him of what was transpiring. Mr. Schmidt testified that he might have been at the door for 15 to 20 seconds prior to walking away from the door and making the phone call to his supervisor.
50. While waiting for his supervisor, Mr. Schmidt saw Mr. Swan approach and guard the accounting room door. Ultimately the police arrived and investigated the incident. He denied any personal relationship with the investigating officer, and no evidence was offered to the contrary.
51. Mr. Schmidt testified that he did nothing that would cause the Claimant to believe that he was threatening her or attempting a robbery.
52. Dr. Farrell A. Crouse is Claimant's treating physician who specializes in psychiatry. He is competent to testify as a medial expert in this case. His office is in New Jersey.
53. Dr. Crouse testified that he saw Claimant very soon after the incident of September 18, 2001 at which time Claimant was very anxious and depressed secondary to the anxiety. Claimant had anger toward Wal-Mart.
54. Dr. Crouse's treatment included numerous telephone conversations with the Claimant and anti-anxiety and anti-depressant medication.
55. According to Dr. Crouse, Claimant improved immeasurably since the initial treatment. As of his disposition of June 23, 2003, Claimant took only a minor amount of medicine, as needed.
56. Claimant treated with Dr. Crouse prior to September 18, 2001 for an adjustment reaction due to family

problems and Dr. Crouse characterized this prior problem as not a serious illness. Dr. Crouse did not release Claimant's prior medical file to the Employer in an effort to respect Claimant's privacy because it did not constitute a valid subpoena in New Jersey.

57. Dr. Crouse did not testify that Claimant suffered a physical injury or an aggravation of any physical injury as a result of this incident at Wal-Mart. Though Claimant testified that she treated with Dr. Auerbach for physical injuries, his testimony concerning his findings and opinions is not in evidence. In short, there is no expert medical evidence that this work incident caused or aggravated any physical condition or injury.
58. Dr. Crouse did not testify that Claimant was disabled as a result of her mental condition or the Wal-Mart incident.
59. Dr. Abram Hostetter is board certified in psychiatry and maintains an active clinical practice in psychiatry in central Pennsylvania. He is qualified to testify in this case as a medical expert in psychiatry.
60. Dr. Hostetter performed a psychiatric evaluation on the Claimant on August 13, 2002 at the request of the Employer. He performed a mental status evaluation which is a structured interview in which he is observes and listens to the patient to determine their appearance, alertness, consciousness, orientation, comprehension, ability to understand questions, ability to formulate answers to the questions, and their thought contents as well as their thought processes. He did not review the earlier medical records of Dr. Crouse since they were not available to him. He explained that these records would have been helpful, but that he was not precluded from reaching a conclusion without them.
61. Dr. Hostetter noted in the history that the Claimant treated with Dr. Crouse for thirty years. She was

taking a tranquilizer, Libruim which is used for anxiety, though it is not used for major mental illnesses. She had been on and off Wellbutrin but restarted the medication five days before the examination.

62. As Claimant spoke, Dr. Hostetter noted that she had no evidence of any memory or cognitive difficulties. She was extremely articulate. She maintained a pleasant mood throughout the interview, and even laughed and chuckled. There was nothing to suggest that she was anxious or depressed. She gave no evidence of having any thought disorder or memory impairment. Claimant tended to ramble into a variety of topics as she spoke but he did not find this as evidence of a psychotic disorder. Among other things, they spoke of her various medical conditions, her family, and the event at Wal-Mart of September 18, 2001.
63. Dr. Hostetter further testified that when asked to describe her psychiatric symptoms she was suffering, she spoke of having panic attacks and gave an example of such an incident. However, Dr. Hostetter opined that she did not suffer a true panic attacks disorder because she did not describe the pattern, frequency or degree of symptoms that constitute the diagnostic criteria of that disorder.
64. Dr. Hostetter diagnosed Claimant with a histrionic personality disorder which is an Axis II psychiatric disorder and is not work-related. An Axis II disorder is ongoing and longstanding. An Axis I psychiatric disorder is more serious and Dr. Hostetter found no evidence of an Axis I disorder. Dr. Hostetter further explained that a personality disorder means that the person has a pattern of functioning which is characteristic of the individual over a long period of time, which causes some problems in their social, employment or family relationships. A personality

disorder is not caused by any one particular event. A histrionic personality disorder involves a pattern of excessive emotions and means that Claimant reacts in excessive ways to situations that may not cause other people to have any trouble. Dr. Hostetter also found that Claimant was dependent on the use of Librium for which she had taken for many years, though this was not interfering with her mental functioning.

65. Dr. Hostetter found that Claimant's speech was excessively impressionistic and lacking in significant information. He explained that she spoke about things in a very dramatic fashion, but the content did not seem to be that significant. The doctor explained that people with Claimant's personality type are somewhat dramatic and exaggerate their expression of emotions.
66. Dr. Hostetter opined that the Claimant has no psychiatric disorder as a consequence of this incident that occurred on September 18, 2001. If Claimant suffered a psychiatric injury at Wal-Mart, which Dr. Hostetter disputes, Claimant fully recovered from such an injury. The basis of this opinion is that she did not describe a particular set of psychiatric symptoms that followed this incident. Rather she described a person who over reacted to a normal event at her workplace that evening and then magnified the event and saw herself as being markedly impaired. However, Claimant does not fit any clinical psychiatric disorder.
67. Dr. Hostetter found no psychiatric reason why the Claimant could not return to her former duties at Wal-Mart.
68. Claimant submitted the Hippocratic Oath into evidence to impeach Dr. Hostetter. This Judge has reviewed the Oath but does not find that it impeaches the physician.
69. Claimant also submitted an MRI report of her back dated February 21, 2002. This shows discogenic end

plate changes at L3-4 and L4-5, facet arthropathy with spondylotic annular bulging at L3-4 and moderate to severe central canal narrowing at L3-4. There is no medical evidence that such changes are related to the Wal-Mart incident or that such changes are disabling.

70. This MRI report was offered by Claimant in response to Dr. Hostetter's disposition. Dr. Hostetter offered an expert opinion in psychiatry, and testified exclusively concerning her mental condition. He did not offer an opinion concerning Claimant's physical condition or specifically her lower back. The MRI report is not significant for Dr. Hostetter's opinion. Though it is mentioned in this report, there is little or no reference to the MRI in his actual testimony. This Judge finds that the MRI does not impeach Dr. Hostetter's credibility concerning Claimant's psychiatric condition.
71. Claimant also offered into evidence a subpoena served by the Employer onto Dr. Auerbach for the production of his records. The subpoena was served on April 10, 2002 requesting the information by April 25, 2002. Claimant highlights for this Judge that at the hearing for May 3, 2002 the Employer counsel stated that he still needed the records of Dr. Auerbach. She further highlights for the Judge that at the hearing of December 2, 2002 the Employer stated that he did not know if he received these records yet. Claimant believes that the Claimant attorney had the records and that any discrepancy is "crucial to her case" for impeachment. Employer counsel advised this court that Dr. Auerbach's records were in fact received by May 20, 2002, and apologized to the court if he misspoke on May 5, 2003. This Judge does not find this discrepancy to be significant. This Judge does not find any malicious intent by defense counsel and accepts his statement that he may simply have misspoken. Given the length of the hearings and

complexity of this matter, this Judge finds counsel's explanation to be entirely plausible.

72. This Judge has also reviewed the police report concerning the events of September 18, 2001. This report confirms that Corporal Leighty responded to a 911 call to the Wal-Mart store on September 18, 2001 at 2:42 A.M. The complaintant was Alberta Swan stating that a man was harassing her at the door of the cash room. The police officer determined that the incident was not criminal and would not be handled as such.
73. This Judge observed all the fact witnesses testify, and observed the Claimant on several occasions. This Judge finds the testimony of Michael Schmidt, Brian Smith, Michael Axe and Dennis Colbert to be credible to the extent they are summarized above. Their testimony is consistent on the essential facts of this case and is corroborated by other evidence including the cash fund transfer log. This Judge does not find the Claimant or her husband to be malicious, but to the extent that there is a conflict, this Judge accepts the testimony from the Employer's four witnesses and rejects the testimony of the Claimant and her witnesses except as otherwise specifically noted in this Decision. As noted by Dr. Hostetter, this Judge notes that Claimant is prone to exaggerate and misperceive normal conditions because of her basic personality type.
74. This Judge finds the Claimant's daughter and husband to be credible in part. This Judge finds that Dennis Colbert stated at the meeting on September 19, 2001 that a videotape existed and that he would view the same. However, this conversation occurred the day after the incident, before he had time to investigate the actual facts. He assumed the cameras were operational. Since the security systems was being overhauled, it is entirely plausible that the taping

system was not operational. Based upon the testimony of Brian Smith, Michael Schmidt and Dennis Colbert, this Judge finds that no tape of the incident exists and the statement of Dennis Colbert to the Claimant's family was spoken in ignorance.

75. Claimant and her family testified that her physical condition has dramatically changed since this incident. However, there is no medical expert testimony that Claimant's pre-existing physical conditions were aggravated or that she suffered new physical injuries as a result of this incident. There is no obvious correlation between stress and the myriad of Claimant's physical complaints including diabetes, muscular skeletal pains, ongoing blood pressure problems etc. While this Judge has no reason to doubt that Claimant suffers from these physical conditions, this Judge is not persuaded or convinced that they are work related. This Judge rejects the testimony of Claimant and her family that the physical injuries relate to the work incident.
76. This Judge finds the testimony of Claimant and her family credible that she suffered anxiety as a result of this incident. Claimant suffered such anxiety in response to Mr. Schmidt's actions that she immediately called for help from her husband and even the police, sought psychological care of Dr. Crouse and even deputized her daughter to meet with the management the next day to discuss the incident. This anxiety is corroborated by the testimony of Dr. Crouse who credibly described Claimant as being very anxious and depressed secondary to anxiety at the time he initially saw her after the event of September 18, 2001. However, there is no expert testimony that Claimant was disabled as a result of this anxiety.
77. This Judge finds as fact that Claimant's anxiety was a result of Claimant's subjective reaction or

misperception of normal work conditions. This Judge finds that Claimant was not exposed to abnormal working conditions in the early morning of September 18, 2001. In support of this, this Judge finds as follows:

A. It is unrefuted that Wal-Mart was overhauling the security camera system and that Mr. Schmidt, a Loss Prevention employee of Wal-Mart, was directed by his supervisor to go to the accounting/cash room to work on the camera system. There was no robbery on September 19, 2001 as feared by the Claimant, and Mr. Schmidt's presence and attempts to enter the accounting area were for entirely legitimate reasons.
B. Claimant admitted that during the incident, she recognized Mr. Schmidt over the closed circuit camera as previously doing work on the cameras near the ceiling of the store, and previously being accompanied by management into the cash room before this event. Claimant recognized his voice. Claimant dispersed cash to Mr. Schmidt for his travel vouchers, as authorized by management. Based on the testimony of Mr. Schmidt, this Judge finds that Claimant was even in the cash room earlier that shift to review the work to be completed.
C. Claimant described being subjected to a steady knocking and hollering, but she did not describe in her testimony any threats, profanity or seeing any weapons.
D. Throughout this relatively short incident, Claimant was secure behind a closed and locked door of the accounting room. Though Claimant described the lock as shoddy, the lock in fact worked. Moreover, Claimant realized that she could have further retreated to a more secure cash room, if necessary.

The Judge finds that there was no reasonable basis for Claimant's reaction and that her anxiety was the result of a misperception and over reaction of normal working

conditions. This finding of fact would not be any different if this Judge accepted the testimony of Claimant and her husband in their entirety.

78. This Judge finds the testimony Dr. Hostetter to be credible. As of the date of his examination, Claimant was not suffering from any work related injury. This Judge finds as credible that Claimant has a histrionic personality disorder which means that Claimant reacts in excessive ways to situations that would not evoke such a response to others. Dr. Hostetter testified that Claimant, because of her personality makeup, over reacted to the situation at the Wal-Mart, and this Judge finds this entirely credible and persuasive given the facts of this incident. This Judge only rejects the testimony of Dr. Hostetter to the extent that it suggests that Claimant did not suffer anxiety in the early morning of September 18, 2001.
79. Claimant was not disabled as a result of the events of September 18, 2001.

DISCUSSION

Claimant's Petition fails for several reasons. An employee claiming a psychiatric disability due to mental/non-physical stimuli must prove that the work-related injury was caused by actual objective abnormal working conditions, as opposed to subjective, perceived or imagined employment events, Martin v. Ketchun Inc. 568 A.2d 159(Pa. 1990). This burden of proving objective abnormal working conditions is true even if the psychological stress results in a physical injury Davis v. W.C.A.B.(Swathmore Boro) 751 A.2d 168 (Pa. 2000). Courts have repeatedly held that an honest, but mistaken, perception of job harassment that aggravates a pre-existing anxiety or causes a psychological injury is not compensable under the Workers' Compensation Act.

Hirschberg v. W.C.A.B. (Dept. of Transportation) 474 A.2d 82 (Pa. Cmwlth 1984); Masico v. W.C.A.B. (Pa. Dept. of Revenue 588 A.2d 984 (Pa. Cmwlth 1991) Claimant misperceived that she was a victim of a robbery in progress. However, the reality is that the alleged assailant was an employee of Wal-Mart's Loss Prevention unit installing video cameras in the store, and had every right to gain entrance into the accounting room. Moreover, this Judge does not find that there was even a rational basis for her belief since she saw no weapon, and recognized the man of having access to the cash room with management in the past. The Claimant was secure behind the locked door throughout the entire incident, and even could retreat to a more secure room if needed. Claimant was not exposed to abnormal working conditions in the course of her employment on September 18, 2001. This is entirely consistent with the credible testimony of Dr. Hostetter who found that Claimant's basic underlying personality results in her being overly emotional and that she over reacts to what most would consider a normal condition. In short, Claimant did not sustain her burden of establishing that she was subjected to an abnormal working condition

Moreover, Claimant's Petition must fail because of insufficient medical evidence. There is no medical testimony that Claimant was disabled as a result of this injury. There is absolutely no medical expert testimony that Claimant suffered a physical injury or an aggravations of her pre-existing physical condition.

CONCLUSIONS OF LAW

1. All parties are bound by the provisions of the Pennsylvania Workers' Compensation Act, as amended.
2. Claimant failed to carry her burden of proof in establishing that she was exposed to abnormal

working conditions which resulted in a psychiatric injury.

3. Claimant failed to carry her burden of proof in establishing that she suffered disability as a result of any psychiatric injury.
4. Claimant failed to carry her burden of proof that she suffered any physical injury or an aggravation of her physical injury as a result of any work incident.

ORDER

AND NOW, this 23rd day of January 2004, it is hereby **ORDERED AND DECREED** that Claimant's Claim Petitions are **DISMISSED**.

"s/Robert J. Benischeck"
Workers' Compensation Judge
RJB/pem
January 16, 2004
Lancaster PA

06-524 Aug. 19. 2006

(3)

Supplemental Appendix:

Appendix E: In the Commonwealth Court of Pennsylvania
Memorandum Opinion by Judge Friedman
July 28, 2005

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alberta A. Swan,	:	
Petitioner	:	
	:	
v.	:	No. 584 C.D.2005
	:	Submitted: June 10,
Workers' Compensation Appeal Board	:	2005
(Wal-Mart # 2334 and A.I.G. Claim	:	
Services, Inc.),	:	
Respondents	:	

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: July 28, 2005

Alberta A. Swan (Claimant) petitions *pro se* for review of the January 26, 2005, order of the Workers' Compensation Appeal Board (WCAB) affirming the decision of a workers' compensation judge (WCJ) to deny Claimant's claim petition. We affirm.

On March 3, 2003, Claimant filed an amended claim petition, alleging that she was totally disabled by psychological and physical injuries suffered as a result of an incident that occurred on September 18, 2001, in the course and scope of her employment with Wal-Mart (Employer). Employer filed a timely answer denying the allegations, and hearings were held before a WCJ.

Claimant testified that she was employed by Employer as an accounting clerk, and she worked the 10:00 p.m. to 7:00 a.m. shift in the store's cash room, where,

among other things, she was responsible for preparing money for deposit in the bank. Claimant explained that the cash room is attached to the accounting room, and one can only access the cash room through the accounting room. Claimant stressed that the only persons permitted access to the accounting room were employees assigned to that location and management. A television monitor outside the accounting room allowed someone working inside to see who was at the door. (WCJ's Findings of Fact, Nos. 5-9)

Claimant testified that sometime after 2:00 a.m. on September 18, 2001, while she was alone in the cash room, she heard a man hollering at the accounting door, knocking heavily and demanding entry. According to Claimant, she recognized the voice and, through the television monitor, she identified the man as someone she previously had seen doing something to the store's cameras; he also had been in the cash room before with a manager.[1] Claimant testified that she denied the man entry, but he began to try to push against the door with his body. Claimant stated that she paged the manager; when he did not respond, she called her husband, who worked in the store's produce

[1] On cross-examination, Claimant was presented with a cash log, in which transfers from the cash fund were reported. Claimant admitted that the September 5, 2001, cash log sheet indicated that, at the direction of management, she had reimbursed expenses for mileage and food to Michael Schmidt, who proved to be the man at the door. Claimant testified that, at the time, she did not know whether Schmidt was an employee, and she denied that she was ever told that he was part of a work crew installing cameras at the store. (WCJ's Findings of Fact, Nos. 12-13)

department, and then dialed 911 to report a robbery in progress. Claimant was still behind the locked accounting room door when her husband, the manager and the police arrived. (WCJ's Findings of Fact, Nos. 10-12.)

After the incident, Claimant finished working her shift; however, she testified that, when she got home, she had difficulty sleeping and her blood pressure was extremely high. Claimant stated that she sought treatment from Farrell Crouse, M.D., who had been her treating physician for over thirty years. Claimant testified that she has not returned to work because of her mental condition; in addition, Claimant testified that the incident has caused various physical ailments, including a worsening of her prior blood pressure problems, diabetes, and back condition. (WCJ's Findings of Fact, Nos. 14-17.) Claimant presented the testimony of her husband and her daughter to corroborate Claimant's own depiction of events and subsequent worsening mental and physical condition. (*See* WCJ's Findings of Fact, Nos. 21-25.)

Claimant also offered the deposition testimony of Dr. Crouse, who specializes in psychiatry. Dr. Crouse stated that he saw Claimant shortly after the September 18, 2001, incident, at which time Claimant was very anxious and depressed secondary to the anxiety, with anger directed at Employer. Dr. Crouse stated that his treatment of Claimant included numerous phone conversations, psychotherapy, anti-anxiety drugs and anti-depressants. According to Dr. Crouse, Claimant had improved immeasurably since the initial treatment and only took a minor amount of medication, as needed. (WCJ's Findings of Fact, Nos. 52-55.) Dr. Crouse did not testify that Claimant suffered a physical injury, or aggravation of a physical injury, as a result of the September 18, 2001, incident. Moreover, Dr. Crouse did not testify that Claimant was disabled as a result of her mental condition or the incident at Employer's store.[2] (WCJ's Findings of Fact, Nos. 57-58.)

In opposition to the claim petition, Employer presented the testimony of Michael Schmidt, the man at the accounting room door during the incident of September 18, 2001. Schmidt testified that, as a loss prevention officer for

Employer, he was part of a crew overhauling security cameras in the store. Schmidt stated that he had met Claimant prior to the incident and had received travel voucher money from her. He testified further that, on the evening of September 18, 2001, he and other loss prevention officers were introduced to Claimant and, later that evening, Claimant was present when they were in the cash room to check the placement of cameras. (WCJ's Findings of Fact, Nos. 44-46.)

Schmidt stated that, sometime after 2:00 a.m., his supervisor sent him and another crew member to the cash room to work on the camera installation. The other man was sidetracked, and when Schmidt arrived alone, he knocked on the

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[2] Aware that Claimant was representing herself in this case, the WCJ informed Claimant that she needed medical evidence to sustain her burden of proof in the case. Further, the WCJ suggested that, because Claimant would benefit by the WCJ's presence during questioning, Claimant should have Dr. Crouse testify live, rather than by deposition. (*See* N.T., 1/15/03 at 9-14; N.T., 3/5/03 at 47-48, 52-56; N.T., 3/26/03, at 21.) The WCJ also advised Claimant on a number of occasions exactly what information she needed to elicit from her medical expert in order to sustain her burden of proof. (*See* N.T., 12/2/02 at 32-33; N.T., 1/15/03 at 11; N.T., 3/5/03 at 57; N.t., 3/26/03 at 20.) Unfortunately, Claimant did not follow the WCJ's advice.

accounting room door, identified himself and looked up into the television camera to be recognized. According to Schmidt, he knocked a "regular" knock a couple of times and requested admittance, but Claimant indicated that she did not know him and warned that if he did not leave, she would call the police. Schmidt testified that he was at the door for only fifteen to twenty seconds before leaving to phone his supervisor about what was transpiring. Schmidt denied threatening Claimant and stated that he did nothing to cause Claimant to believe that he was attempting a robbery. (WCJ's Findings of Fact, Nos. 47-49, 51.) In addition to Schmidt, Employer presented the testimony of three fact

witnesses who corroborated Schmidt's version of events. (*See* WCJ's Findings of Fact, Nos. 26-27, 24-35, 37-38, 42-43.)

Employer also presented the deposition of Abram Hostetter, M.D., a board-certified psychiatrist, who performed a psychiatric evaluation of Claimant on August 13, 2002, at Employer's request. Dr. Hostetter diagnosed Claimant with a longstanding, non-work-related histrionic personality disorder, and Dr. Hostetter explained that this personality disorder involves a pattern of excessive emotions and means that Claimant reacts excessively to situations that may not cause others any trouble. Dr. Hostetter opined that Claimant has no psychiatric disorder as a consequence of the September 18, 2001, incident; rather, she overreacted to a normal workplace event and then magnified the event and saw herself as markedly impaired by it. Dr. Hostetter also opined that Claimant could return to her former employment with Employer. (WCJ's Findings of Fact, Nos. 59-60, 62, 64, 66-67.)

The WCJ credited the testimony of Employer's fact witnesses as to the events of September 18, 2001, over the contrary version offered by Claimant. (WCJ's Findings of Fact, No. 73.) The WCJ also rejected the testimony of Claimant and her family relating any of Claimant's physical problems to the work incident and noted that Claimant presented no medical testimony establishing such a relationship. (WCJ's Findings of Fact, No. 75.) The WCJ credited the testimony of Claimant, her family and Dr. Crouse that Claimant suffered anxiety in response to Schmidt's actions during the incident; however, accepting Dr. Hostetter's testimony, the WCJ found that Claimant had no reasonable basis for her response. (WCJ's Findings of Fact, Nos. 76-78.) Moreover, the WCJ found that there was no expert testimony that Claimant was disabled as a result of the events of September 18, 2001. (WCJ's Findings of Fact, No. 79.)

Based on these credibility determinations, the WCJ concluded that Claimant failed to carry her burden of proving that: (1) she was exposed to abnormal working conditions resulting in a psychiatric injury; (2) she suffered disability as a result of any psychiatric injury; or (3) she suffered any work-related physical injury. (WCJ's Conclusions of Law, Nos. 2-4.) Accordingly, the WCJ dismissed Claimant's claim petition. The WCAB affirmed.

On appeal to this court,[3] Claimant argues that the WCJ and WCAB erred in denying her claim petition. Claimant asserts that she proved that her

[3] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

working conditions on September 18, 2001, were not normal and that she became disabled as a result of the September 18, 2001, work incident.[4] We disagree.

In every claim petition proceeding, the claimant bears the burden of proving all the elements necessary to establish entitlement to an award of benefits. *Inglis House v. Workmen's Compensation Appeal Board* (*Reedy*), 535 Pa. 135, 634 A.2d 592 (1993). Where there is no obvious causal connection between an injury and the alleged work-related cause, that cause must be established by unequivocal medical testimony. *Lewis v. Commonwealth*, 508 Pa. 360, 498 A. 2d 800 (1985); *Cromie v. Workmen's Compensation Appeal Board* (*Anchor Hocking Corp.*), 600 A.2d 677 (Pa. Cmwlth. 1991). Similarly, where the work-related nature of the injury is obvious, but its relation to ongoing disability may not be, there is a need for medical evidence. *Cromie*. Further, to recover workers' compensation benefits for a psychic injury, a claimant must prove by objective evidence that he or she has suffered a psychic injury and that such injury is other

than a subjective reaction to normal working conditions; that is, the claimant must establish that the injury arose from abnormal working conditions. *Davis v. Workers' Compensation Appeal Board* (*Swarthmore Borough*), 561 Pa. 462, 751 A.2d 168 (2000). Even if a claimant shows actual, not merely perceived or imagined, employment events that have precipitated psychic injury, the claimant must still prove the events to be abnormal in order to recover. *Id.* Whether the claimant has been exposed to

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[4] In her Statement of Questions Involved, Claimant also argues that the WCAB failed to address Claimant's **mental** injuries before rendering a decision, as evident by the WCAB's statement in its opinion that "Claimant presented no testimony establishing that she sustained any **physical** injuries." (WCAB's op. at 7; Claimant's brief at 10, emphasis in original). However, in isolating this one statement, Claimant simply ignores the WCAB's discussion of her claim of work-related psychological injury; thus, we will not address the matter further.

abnormal working conditions is a question of law that is fully reviewable on appeal. *Id.*

In her brief to this court, Claimant recounts her own version of the events of September 18, 2001, characterizing Schmidt's behavior as violent and asserting that her life was in danger because Schmidt was attempting to break into the cash room and rob her. However, the WCJ rejected Claimant's version of events and accepted the contrary testimony of Employer's fact witnesses regarding the occurrences of that evening. The WCJ is the ultimate fact-finder in a workers' compensation case, with sole authority to assess the credibility of witnesses and resolve conflicting testimony. *Grimes v. Workmen's Compensation Appeal Board* (*Proctor & Gamble*), 679 A.2d 1356 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 670, 685 A.2d 548 (1996). Although the WCJ believed that Claimant suffered from anxiety as a result of the September 18, 2001, incident, Schmidt's testimony and Dr. Hostetter's credible opinion fully support the WCJ's determination that Claimant overreacted to normal

work events. Thus, the WCJ did not err in determining that Claimant was not subjected to abnormal working conditions.

Claimant also contends that she provided sufficient medical evidence to prove that she became disabled as a result of the work incident. However, the record fully supports the WCJ's findings that Dr. Crouse's testimony was inadequate to sustain Claimant's burden of proof.[5] Thus, the WCJ did not err

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[5] In her appeal documents, Claimant included a letter from Dr. Crouse, dated February 11, 2004, expressing his professional opinion that the incident on September 18, 2001, was responsible for worsening Claimant's emotional condition and rendered her unable to work. (Footnote continued on next page...)

In denying Claimant benefits based on her failure to prove that she sustained any physical or mental disability.

Accordingly, we affirm.

"s/Rochelle S. Friedman, Judge

(continued...)
(Attachment D to Claimant's appeal from the WCJ's decision.) However, because this document was not part of the record before the WCJ, it cannot be considered on appeal.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alberta A. Swan,	:	
Petitioner	:	
v.	:	No. 584 C.D. 2005
Workers' Compensation Appeal Board (Wal-Mart # 2334 and A.I.G. Claim Services, Inc.),	:	
Respondents	:	

ORDER

AND NOW, this 28th day of July, 2005, the order of the Workers' Compensation Appeal Board, dated January 26, 2005, is hereby affirmed.

"s/Rochelle S. Friedman, Judge

Certified from the Record
July 28, 2005
and Order Exit

No. 06-524

In The
Supreme Court of the United States

ALBERTA A. SWAN,

Petitioner,

v.

WAL-MART,

Respondent.

On Petition For A Writ Of Certiorari To The Commonwealth Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where Petitioner Alberta Swan's Petition for Writ of Certiorari raises only questions of state law, such that this Court lacks jurisdiction over her claim pursuant to 28 U.S.C. § 1257, must her Petition be denied?

2. Where her Petition presents no compelling reason(s) for granting the writ of certiorari, should Petitioner Alberta Swan's Petition for Writ of Certiorari be denied?

3. Where the Pennsylvania courts correctly affirmed the denial of Petitioners' claim for workers' compensation benefits under Pennsylvania state law based on well-supported findings of fact, should Petitioner Alberta Swan's Petition for Writ of Certiorari be denied?

CORPORATE DISCLOSURE STATEMENT

Although Petitioner has listed "Wal-Mart" as the respondent, there is no legal entity by that name. The named party in the state proceedings below was "Wal-Mart Store #2334." Wal-Mart Store #2334 is operated by Wal-Mart Stores East, L.P., an indirect wholly-owned subsidiary of Wal-Mart Stores, Inc. Title to the real estate upon which Wal-Mart Store #2334 is located is held by Wal-Mart Stores, Inc. Wal-Mart Stores, Inc. is a publicly held corporation whose shares of common stock are listed on the New York Stock Exchange. Wal-Mart Stores, Inc. has no parent and no publicly held company owns 10% or more of its stock.

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Alberta A. Swan v. Workers' Compensation Appeal Board (Wal-Mart #2334 and A.I.G. Claim Services, Inc.), No. 718 MAL 2005, 587 Pa. 718, 898 A.2d 1074 (Table) (May 1, 2006) (per curiam) (Petitioner's Appendix B).

Alberta A. Swan v. Workers' Compensation Appeal Board (Wal-Mart #2334 and A.I.G. Claim Services, Inc.), slip op., No. 584 C.D. 2005 (Pa. Commw. Ct. July 28, 2005) (Petitioner's Supplemental Appendix).

Alberta A. Swan v. Workers' Compensation Appeal Board (Wal-Mart #2334 and A.I.G. Claim Services, Inc.), slip op., No. A04-0448 (Pa. Workers' Compensation Appeal Board, Harrisburg, Jan. 26, 2005) (Petitioner's Appendix C).

Alberta A. Swan v. Wal-Mart #2334, slip op., No. 2340253 (Pa. Dept. of Labor and Industry, Bureau of Workers' Compensation) (January 27, 2004) (Benischeck, J.) (Petitioner's Appendix D).

COUNTERSTATEMENT OF BASIS FOR JURISDICTION

The judgment sought to be reviewed, the Supreme Court of Pennsylvania's denial of Ms. Swan's Petition for Allowance of Appeal, was entered on May 6, 2006. Petitioner's Application for Reconsideration in the Supreme

Court of Pennsylvania was denied by order dated June 6, 2006. Ms. Swan filed a timely *pro se* Petition for Writ of Certiorari with this Court on August 19, 2006, which, following the filing of her Supplemental Appendix, was placed on this Court's docket on October 18, 2006.

In her Petition, Ms. Swan does not challenge the constitutionality of any federal or state statute, so the notification requirements of Supreme Court Rules 29.4(b) and (c) are not invoked.

Petitioner properly invokes 28 U.S.C. § 1254 as the basis for this Court's jurisdiction to *consider* her Petition for a Writ of Certiorari. However, this Court does not have jurisdiction to *decide* any claim or question raised in Ms. Swan's Petition because the Petition does not raise any federal question as set forth in 28 U.S.C. § 1257(a). Rather, the Petition raises only questions of state law, which this Court, respectfully, lacks jurisdiction to decide.

COUNTERSTATEMENT OF THE CASE

This is a simple state workers' compensation case, raising no federal questions.

On March 3, 2003, Petitioner filed an amended claim petition pursuant to the Pennsylvania Workers' Compensation Act seeking total disability benefits for an incident that occurred on September 18, 2001 in the course and scope of her employment with Wal-Mart. She claimed that, as she was working as a clerk in the cash room of a Wal-Mart store, someone began to knock and "holler" outside the locked door of the cash room demanding to be let in. She became alarmed and called a manager. When the

manager did not respond, she called her husband (who was working in the store) and then called 911, reporting a robbery in progress. The police, her husband, and a store manager arrived shortly thereafter.

The man at the door was, in fact, a loss prevention officer employed by Wal-Mart named Michael Schmidt. Earlier in the evening, Mr. Schmidt and other loss prevention officers were introduced to Petitioner and told her that they would be working in and around the office all evening installing new security cameras. At approximately 2:00 a.m., Mr. Schmidt went to work on the cameras in the cash room. He knocked on the door, announced himself as "Mike from Loss Prevention" and looked up into the camera so that Petitioner could see who he was. Mr. Schmidt never threatened Petitioner in any way when he approached the door.

In her workers' compensation claim, Petitioner claimed that she was physically and psychologically disabled by this incident. Ms. Swan at no point in the workers' compensation proceedings asserted any federal claim. Following a full evidentiary hearing before Pennsylvania Workers' Compensation Judge (WCJ) Robert Benischeck, Judge Benischeck, in a Decision and Order circulated on January 27, 2004 (Petitioner's Appendix D), found that Petitioner failed to sustain her burden in demonstrating she suffered an injury while in the course and scope of her employment. Specifically, the WCJ found that Ms. Swan failed to establish she was exposed to abnormal working conditions which resulted in a psychiatric injury. Additionally, the WCJ found that there was no evidence she suffered any disability as a result of any psychiatric injury. Finally, the WCJ determined Petitioner

failed to carry her burden of proof that she suffered any physical injury or aggravation of a physical injury as a result of any workplace incident.

On February 14, 2004, Petitioner filed an Appeal with the Pennsylvania Workers' Compensation Appeal Board ("the Board"). On January 26, 2005, the Board affirmed Judge Benischek's decision (Petitioner's Appendix C), concluding that the decision was supported by substantial, competent evidence and that the Petitioner presented no evidence she sustained any physical injury. The Board agreed Petitioner was not subjected to abnormal working conditions, noting that the WCJ did not believe Petitioner's version of events.

On February 9, 2005, Petitioner filed a Petition for Review with the Commonwealth Court of Pennsylvania. The Commonwealth Court filed an unreported Memorandum Opinion, *Alberta A. Swan v. Workers' Compensation Appeal Bd. (Wal-Mart #2334 and A.I.G. Claim Services, Inc.)*, slip op., No. 584 C.D. 2005 (Pa. Commw. Ct. July 28, 2005) (Petitioner's Supplemental Appendix) affirming the determinations of the workers' compensation judge and the Board.

On August 27, 2005, Petitioner petitioned the Supreme Court of Pennsylvania for allowance of appeal of the decision of the Commonwealth Court. The Pennsylvania Supreme Court denied leave to appeal by order dated May 6, 2006 (Petitioner's Appendix B) and, by order dated June 6, 2006, denied Petitioner's Application for Reconsideration (Petitioner's Appendix A).

SUMMARY OF ARGUMENT

Respectfully, this Court lacks jurisdiction to review the issues raised in Ms. Swan's Petition for Writ of Certiorari. Pursuant to 28 U.S.C. § 1257(a), this Court has jurisdiction to review by writ of certiorari decisions of the highest court of a state that calls into question a federal law or treaty, calls into question the validity of a state law as being "repugnant to" the Constitution or federal law, or sets up or claims any federal or Constitutional claim or right. The Supreme Court of Pennsylvania's decision here does none of those things. Rather, the court simply denied discretionary review of an intermediate appellate court's affirmance of the denial of Petitioner's claim for workers' compensation benefits under Pennsylvania state law. Other than oblique references to the Americans with Disabilities Act (pursuant to which Petitioner brought no claim), Petitioner raises no federal question in her present Petition, and previously raised no federal issues or claims in the state courts. Moreover, the state courts decided no federal issues.

Even if this Court had jurisdiction to review Petitioner's claims, certiorari should nevertheless be denied. Ms. Swan's Petition raises no "compelling reasons" for this Court's review. Sup. Ct. R. 10. Instead, the asserted error consists of purported erroneous factual findings and the purported misapplication of Pennsylvania law in a case brought exclusively under the Pennsylvania Workers' Compensation Act. This is not a proper basis for this Court's assertion of jurisdiction or review pursuant to a writ of certiorari. *Id.* Moreover, the Petition raises issues of interest only to the parties; no issues of public importance are raised.

Finally, it is clear that Petitioner's state workers' compensation claim was correctly decided on its merits. The workers' compensation judge properly found that, based on express credibility determinations and findings of fact, Petitioner failed to prove required elements of her claim. These findings of fact were accepted by the Pennsylvania Commonwealth Court as being supported by the record, and were not disturbed by the Supreme Court of Pennsylvania. With two Pennsylvania appellate courts accepting the findings of fact by the workers' compensation judge, Petitioner offers no reason why this Court should disturb those findings or the Pennsylvania courts' denial of her workers' compensation claim.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION OVER PETITIONER'S PURELY STATE LAW CLAIMS.

This Court's jurisdiction to review decisions of the highest court of a state pursuant to a writ of certiorari is defined and limited by 28 U.S.C. § 1257 which reads, in pertinent part, as follows:

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or

> claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). Pursuant to this statute, this Court lacks jurisdiction over final judgments of state courts that do not raise a federal question. *See also Ellis v. Dixon*, 349 U.S. 458, 459 (1955) (if state court's decision rested on nonfederal ground, Supreme Court "must decline to take jurisdiction"); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18 (1950) (if decision "may be supportable as a matter of State law," [it is] not subject to review by this Court. . . .").

In the present case, Petitioner does not "draw into question" the validity of any federal or state law on any ground. Therefore, the first two possible bases for this Court's jurisdiction as set forth in section 1257 are not applicable.

The third basis for jurisdiction in section 1257 also is not applicable, because the Petition does not "set up or claim[]" any federal right. It is clear that, despite a single oblique reference to the Americans with Disabilities Act in her "Questions Presented" (Petition, 2)[1], and elsewhere in

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[1] The pages of Ms. Swan's *pro se* Petition are not numbered, so citations to the Petition assume that it is numbered consecutively, with the cover being page 1. Thus, for example, Petitioner's "Questions Presented" section appears on page 2.

Notably, Ms. Swan's Petition does not comply with Supreme Court Rule 14(g)(1), which requires a petitioner seeking review of a state court judgment to note with specificity where the federal question(s) for which review is sought were raised at each stage of the state court proceedings, "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

her Petition (Petition, 7, 11), Ms. Swan does not *assert* any claim under the ADA, but instead seeks review only of the denial of her claim for workers' compensation under the Pennsylvania Workers' Compensation Act. Nor could she properly assert an ADA claim in her Petition, because at no point in the state court proceedings did Petitioner *bring* a discrimination claim under the ADA; instead, she proceeded *exclusively* pursuant to the Pennsylvania Workers' Compensation Act.[2] Furthermore, it is clear that neither

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[2] Indeed, to properly assert a claim under the ADA, Petitioner would have had to first present such a claim to the federal Equal Employment Opportunity Commission or its Pennsylvania equivalent, the Pennsylvania Human Relations Commission (PHRC). *See Churchill v. Star Enterprises*, 183 F.3d 184, 190 (3d Cir. 1999) (plaintiff bringing claim under ADA or its Pennsylvania equivalent is required to exhaust administrative remedies with EEOC and PHRC before filing suit). She did not do so. She also would have been required to assert that despite her asserted disability, she was otherwise able to perform the essential functions of her employment with reasonable accommodation. *See Imler v. Hollidaysburg American Legion Ambulance Service*, 731 A.2d 169, 173-74 (Pa. Super. 1999) (interpreting requirements of ADA and its Pennsylvania equivalent). Here, Petitioner made no such assertion; indeed, she claimed the opposite – that she was totally disabled following the September 18, 2001 incident, and was unable to return to work in any capacity (Petition, 7, 10). Moreover, Petitioner never developed any argument under the ADA in the state court proceedings. She, at most, as in her present Petition, *referred* in passing to the ADA.

Because of these deficiencies, even if Petitioner somehow can be deemed to have *presented* a federal ADA claim in the state courts – she did not – she did not *adequately* present any such claim. Therefore, jurisdiction is lacking. *See Webb v. Webb*, 451 U.S. 493, 496-97 (1981) ("It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.").

Although certain later decisions by this Court question whether the rule that a federal question not "pressed or passed on by" a state court will not be considered by this Court is jurisdictional or simply prudential, the result is the same – this Court will decline to consider any

(Continued on following page)

the Commonwealth Court nor the Supreme Court of Pennsylvania even considered, much less denied, any claim under the ADA.

Because Petitioner pursued only state law claims in the state courts, and because her present Petition presents no federal claim or question, this Court, respectfully, lacks jurisdiction to consider Petitioner's claims.

II. EVEN IF THIS COURT HAD JURISDICTION TO REVIEW PETITIONER'S PURELY STATE LAW CLAIMS, IT SHOULD DECLINE TO DO SO BECAUSE THE PETITION DOES NOT PRESENT ANY COMPELLING REASON(S) FOR GRANTING THE WRIT OF CERTIORARI.

Even assuming *arguendo* that this Court properly could assert jurisdiction over Petitioner's claims, it should decline to do so. *See Hammerstein v. Superior Court of California*, 341 U.S. 491, 492 (1951) ("The presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction, for the issuance of the writ is discretionary."). It is clear that the Petition presents no "compelling reasons" for granting

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federal claim not clearly presented to and decided by the highest state court in which a decision may be had. *See Adams v. Roberston*, 520 U.S. 83, 86 (1997) (with "very rare exceptions, . . . we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision that we have been asked to review") (internal quotations and citations omitted). *See also Illinois v. Gates*, 462 U.S. 213, 222 (1983) (whether "not pressed or passed upon below" rule is jurisdictional or prudential, result was the same – Court declined review of federal issue not fairly presented to state courts).

certiorari. Sup. Ct. R. 10. Indeed, Petitioner does not even attempt to argue that her Petition presents any compelling reasons for this Court's review. Rather, she merely seeks a review on the merits of the denial of her state law workers' compensation claim, which is a matter of concern only to the litigants, and presents no issues of public importance. Furthermore, as noted, Petitioner raises no federal claims or issues in her Petition, and the Pennsylvania courts decided no federal claims or issues. Under these circumstances, the Court should deny the Petition.

Supreme Court Rule 10 provides, in relevant part, that "review on a writ of certiorari is not a matter of right, but of judicial discretion" and that "certiorari will be granted only for compelling reasons." Rule 10 further states, in relevant part, that such "compelling reasons" may be found to exist where:[3]

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. Furthermore, Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

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[3] Subsection (a) of Rule 10 concerns decisions by United States courts of appeals, and is therefore not relevant to this case.

Ms. Swan's Petition does not implicate any "compelling reasons" stated in Rule 10(b) for granting certiorari. Although the reasons cited in Rule 10 are not exclusive, this Court has held that it should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . . " *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923).

Subsection (b) of Rule 10 does not support the grant of the Petition. Initially, there was no "decision" by the "state court of last resort" in this case, the Supreme Court of Pennsylvania. Rather, that court merely denied Petitioner's application for allowance of appeal from the decision of the intermediate Commonwealth Court. Thus, subsection (b) does not apply by its very terms.

Moreover, neither subsection (b) nor (c) of Supreme Court Rule 10 supports the grant of certiorari because no "important federal question" (indeed, *no* federal question *at all*) was decided by any Pennsylvania court in this case. The opinion of the Commonwealth Court (Petitioner's Supplemental Appendix) does not refer to, or decide, any federal issue and, as noted, the Pennsylvania Supreme Court declined to consider the case on its merits. *See Webb*, 451 U.S. at 495 (in reversing grant of certiorari, Court noted that "nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon").

Indeed, this is a paradigm case where a petitioner asserts that the error consists of "erroneous factual findings or the misapplication of a properly stated rule of law[,]" in which certiorari is "rarely" granted. Sup. Ct. R. 10. Ms. Swan does not even argue that her Petition seeks

review of issues of public importance. Certiorari is inappropriate where any decision by this Court would benefit only the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

Therefore, the Court should deny the Petition.

III. THE COURT SHOULD DENY CERTIORARI BECAUSE THE PENNSYLVANIA COURTS CORRECTLY AFFIRMED THE DENIAL OF PETITIONER'S STATE WORKERS' COMPENSATION CLAIM.

The Commonwealth Court of Pennsylvania, in a decision in which discretionary review was denied by the Supreme Court of Pennsylvania, correctly affirmed the decision of the workers' compensation judge and the Board denying Petitioner's claim for workers' compensation benefit. Because this decision was based on express credibility determinations and findings of fact, and because Petitioner has offered no reason to disturb those findings, the decision of the Pennsylvania courts should stand. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n.5 (1985) (Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts).

As the Commonwealth Court correctly noted, under Pennsylvania law, a workers' compensation claimant bears the burden of proving all the elements necessary to establish entitlement to an award of benefits. *Alberta A. Swan v. Workers' Compensation Appeal Bd. (Wal-Mart #2334 and A.I.G. Claim Services, Inc.)*, slip op., No. 584 C.D. 2005, at p. 7 (Pa. Commw. Ct. July 28, 2005) (Petitioner's Supplemental Appendix). Where a claimant asserts a work-related mental

injury, the claimant must prove by objective evidence that the injury is not a subjective reaction to normal working conditions. *Davis v. Workmen's Compensation Appeal Bd. (Swarthmore Borough)*, 561 Pa. 462, 751 A.2d 168, 174 (2000). An honest, mistaken, perception of job harassment that aggravates a pre-existing anxiety or causes a psychological injury is not compensable under the Pennsylvania Workers' Compensation Act. *Hirschberg v. Workmen's Compensation Appeal Bd. (Dept. of Transp.)*, 81 Pa. Commw. 579, 474 A.2d 82 (1984).

Here, the workers' compensation judge rejected Petitioner's version of the events of September 18, 2001 and accepted the testimony of Wal-Mart's fact witnesses regarding the occurrences of that evening (Petitioner's Appendix D). The WCJ found that the Petitioner was not the victim of abnormal working conditions, but that her anxiety was the result of her misperception and overreaction to normal working conditions. Furthermore, the WCJ noted that Petitioner failed to present any medical evidence that she was disabled as a result of her anxiety. Finally, the WCJ accepted the testimony of Wal-Mart's medical expert with respect to his opinion that Petitioner suffered from histrionic personality disorder that predisposed her to excessive reactions to situations.

The Commonwealth accepted these findings, which it found were based on the WCJ's credibility determinations, and therefore affirmed the denial of Petitioner's workers' compensation claim. *Swan*, slip op. at 6, 8-9 (Petitioner's Supplemental Appendix). The Supreme Court of Pennsylvania, when confronted with arguments nearly identical to the ones presented in the petition, declined review (Petitioner's Appendix A and B).

Because Petitioner offers no reasons why these findings of fact on matters of state law, which were accepted as supported by the record at all levels of review, should be disturbed by this Court, certiorari should be denied.

CONCLUSION

For the reasons set forth above, Respondent Wal-Mart Stores Inc. respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 06-524

FILED
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SUPREME COURT, U.S.

In The

Supr me Court of the United States

Alberta A. Swan - Petitioner

v.

Wal-Mart - Respondent

No. 06-524

Petition For The Rehearing Of An Order To The Supreme Court of The United States

PETITION FOR THE REHEARING OF AN ORDER

Alberta A. Swan (Pro Se)
177 Eastbrook Road
Smoketown, PA 17576
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PETITION FOR THE REHEARING OF AN ORDER

In the preceding documents and hearings concerning Alberta A. Swan v. Wal-Mart (No: 06-524), Wal-Mart failed to bring in two key witnesses who are critical to the verdict of this particular case of Alberta A. Swan v. Wal-Mart. Kevin Moeller, a Wal-Mart assistant store manager who was my direct supervisor, and Alicia Beatty, a Wal-Mart employee, did not appear at the court hearings to testify. Kevin Moeller, a Wal-Mart assistant store manager who was also my direct supervisor, did not appear at the court hearings to testify why was he not on duty on September 18, 2001 during the attempted robbery. Alicia Beatty, an employee who was on duty at the time of the incident, did not appear at the court hearings to testify. Ironically, Mrs. Beatty's statement is on police record.

Wal-Mart failed to have a deposition with Dr. Allen Auerbach concerning my physical condition, which has worsened since September 18, 2001. Wal-Mart did not request for me to take an IME with their doctor concerning my physically disabled body.

In the case of Alberta A. Swan v. Wal-Mart, a fundamental rule was disregarded by the employer, Wal-Mart (store number 2334). A rule is a guide or principle for governing action; it is a regulation – it is the usual way of doing something (Merriam-Webster Dictionary). Wal-Mart's rule was that no one was permitted to enter the accounting room / cash room unless accompanied by management. Wal-Mart's employee, Mr. Michael Schmidt, broke the rule and demanded entrance into the accounting room / cash room without being accompanied by management. Wal-Mart's employee, Mr. Michael Schmidt, attempted robbery while I was protecting Wal-Mart's cash assets. No manager was on duty to protect me from harm (a minimum of one Wal-Mart store manager is supposed to be on duty at all times for employee assistance and emergencies). At the time of the

attempted Wal-Mart robbery on September 18, 2001, no Wal-Mart store managers were on duty to protect me from an emergency.

WalMart's Open Door Policy states, "*If associates have ideas or concerns, they can discuss them with their supervisor without fear of retaliation.*" *However, if associates feel their supervisor is the source of the problem, or if their supervisor has not addressed the problem satisfactorily, associates can go to any level of management in the Company with concerns.*" (My Career; walmartstores.com). This policy states that Wal-Mart's associates will be heard by Wal-Mart's management. However, it is evident that I have not been heard, and this is why I am now pleading to the Honorable Supreme Court of the United States.

I am pleading to the Honorable Supreme Court of the United States due to the fact that Wal-Mart is totally disregarding an attempted robbery at the Wal-Mart store on September 18, 2001 when a Wal-Mart employee, Mr. Michael Schmidt, demanded entry into the accounting room / cash room while I was protecting Wal-Mart's cash assets during my shift. I am pleading to the Honorable Supreme Court of the United States due to the fact that a fundamental rule was broken – rule: no one is allowed into the accounting room / cash room unless accompanied by management (Mr. Michael Schmidt, a Wal-Mart employee, demanded entrance into the accounting room / cash room without being accompanied by management). I am pleading to the Honorable Supreme Court of the United States due to the fact that contrary to proper protocol, no managers were on duty to protect me from an attempted robbery on September 18, 2001. I am pleading to the Honorable Supreme Court of the United States because Wal-Mart has done nothing to help me - I was put in a hostile situation of an attempted robbery, and when I called Wal-Mart's store management for help, there was no response because there were no managers on duty to help me.

Wal-Mart's Culture is based on the three basic beliefs to the Sundown Rule: "*we respect our customers, Associates and suppliers and strive to treat them as we ourselves want to be treated.*" (Sundown Rule – walmartstores.com). According to the aforementioned statement, Wal-Mart respects their associates and strives to treat them in the same way they (Wal-Mart) want to be treated. I question the integrity of Wal-Mart's belief system.

If Wal-Mart's employee, Mr. Michael Schmidt, would have followed proper protocol, I would not be in the condition I am in now. I have anxiety attacks and at times post traumatic attacks. I am depressed, very depressed at times due to the anxiety and post traumatic attacks. It is evident that Wal-Mart has done nothing to help me to recover from this horrible, horrible situation. Instead, Wal-Mart has looked the other way (contrary to their belief system and open door policy).

Please consider the wrongfulness Wal-Mart has done to me. The actions of the intruder, Mr. Schmidt (Wal-Mart's employee), were not caught on tape because the surveillance cameras were not working at the time. I was not aware that the surveillance cameras were not working during the attempted robbery, and neither was store manager Dennis Colbert aware that the surveillance cameras were not working, according to his testimony. In fact, Dennis Colbert, Wal-Mart's store manager, testified that he did not know the surveillance cameras were not taping on September 18, 2001 – he testified that he was not told that the surveillance cameras were not taping on September 18, 2001.

Due to the incident that happened to me at Wal-Mart on September 18, 2001, I now suffer from mental depression, anxiety attacks, and post traumatic attacks. Suffering from these disorders have caused me physical medical problems as well (mental disorders can cause physical conditions, even if there are no pre-existing physical problems). Due to the incident that happened to me at Wal-Mart on September 18, 2001, I am now bent-over and cannot stand up straight. Due

to the incident that happened to me at Wal-Mart on September 18, 2001, I am unable to fulfill my duties as a wife. Due to the incident that happened to me at Wal-Mart on September 18, 2001, I now have very limited pleasure. Due to the incident that happened to me at Wal-Mart on September 18, 2001, I am unable to fully enjoy my six grandchildren.

Yes, Wal-Mart has changed my life mentally and physically. In his testimony, Mr. Brian Smith, Michael Schmidt's direct supervisor, did not say that he was not aware of the rule concerning the entering of the accounting room / cash room. In his testimony, Mr. Michael Schmidt, the intruder, did not say that he was not aware of the rule concerning the entering of the accounting room / cash room. It is evident that Mr. Michael Schmidt, the intruder, did not follow proper protocol; he broke the rule. Seeing someone or knowing someone, or having someone for an employee does not mean that he or she will not rob you. Mr. Schmidt demanded his way into the accounting room / cash room. A robber does not ask how much money one has before he or she robs you. A robber will rob day or night. Trying to enter a locked door by force is called breaking in. The normal way to enter a locked door is with a key. The normal way to enter a room where not permitted without management is to bring management with you. No one would know in advance how he or she would react during an attempted robbery. No one testified of this reaction.

It was me who was put in this hostile position that was a danger and threat to my life. The intruder (Mr. Schmidt) knew his actions would not be taped on camera for evidence. Yes, I panicked, because I am human. I became very scared, afraid for my life, afraid of being robbed.

Now I am at the mercy of the Honorable Supreme Court of the United States. I beg, I plead - I hope the Honorable Supreme Court of the United States will see to it that justice will be served in Alberta A. Swan v. Wal-Mart in which Wal-Mart disregarded their rule / regulation where no

one is allowed into the accounting room / cash room unless accompanied by management. I hope the Honorable Supreme Court of the United States will order Wal-Mart to pay me workers' compensation, which is lawfully and rightfully due to me as evident by documentation from licensed physicians stating my disability as a result of the incident that occurred to me at Wal-Mart, store number 2334, on September 18, 2001.

Respectfully submitted,

Alberta A. Swan

Date: 2/13/07